IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78- 78-658

UTAH POWER & LIGHT COMPANY, *Petitioner*

v.

ENVIRONMENTAL DEFENSE FUND, INC.,
DOUGLAS M. COSTLE, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

INDEX TO CITATIONS

CASES:

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Petitioner, Utah Power & Light Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion and Order of the District Court, dated April 20, 1978, denying Utah Power's motion to intervene is unofficially reported at [1978] 12 Envir. Rep. (BNA) 1001, and is reprinted as Appendix A to this Petition at pages 1a-18a, *infra*. The Order and Memorandum Opinion of the Court of Appeals for the District of Columbia Circuit entered on July 31, 1978, affirming the district court's decision, is unreported and is reprinted as Appendix B to this Petition at pages 19a-22a, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, pp. 19a-22a, *infra*) was entered on July 31, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Under Rule 24(a) of the Federal Rules of Civil Procedure and this Court's interpretation of that Rule in *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972), an applicant for intervention otherwise meeting the requirements of Rule 24(a) is allowed to intervene as of right if representation of that applicant's interest by existing parties "may be" inadequate. In light of this Court's decision in *New Jersey* v. *New York,* 345 U.S. 369 (1953), which imposed a stricter test for determining adequacy of representation *only* for original jurisdiction actions in this Court, the question presented is:

Whether a state's intervention in a lawsuit in federal district court requires that a citizen of that state seeking to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure satisfy the more stringent standard which this Court applies in judging adequacy of representation in original jurisdiction actions?

STATUTE INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure, 28 U.S.C., provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

On August 22, 1977, plaintiff Environmental Defense Fund, Inc., commenced this action in the United States District Court for the District of Columbia for declaratory, injunctive and mandatory relief. The named defendants include the Administrator of the Environmental Protection Agency, the Secretary of Interior and the Commissioner of the Bureau of Reclamation. Plaintiff seeks in this action: (a) to set aside the Environmental Protection Agency's (EPA) approval of state-promulgated water quality standards and implementation plans governing salinity pollution in the Colorado River Basin; (b) to require EPA to promulgate effective water quality standards and implementation plans for salinity; and (c) to require defendants to implement necessary salinity control measures.

Jurisdiction in the district court was sought under 28 U.S.C. § 1331 (Federal Question); 33 U.S.C. § 1365 (Citizens suits under the Federal Water Pollution Control Act of 1972); 28 U.S.C. § 1361 (Mandamus); 28 U.S.C. § 1337 (Commerce regulation); and 42 U.S.C. § 4321 *et seq.* (The National Environmental Policy Act of 1969).

On January 19, 1978, the district court granted the motions to intervene of the seven Colorado River Basin

states: Nevada, California, Utah, Colorado, Wyoming, New Mexico and Arizona. Each of these states had sought leave to intervene as defendants in order to protect various proprietary, sovereign and economic interests at stake in this litigation.

Each of the states through which the Colorado River runs has a primary proprietary interest in the waters of that River. The Upper Basin states are entitled to certain quantities of water from the River according to two interstate compacts: the Colorado River Compact, approved in the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617, and the Upper Colorado River Basin Compact, approved in Act of April 6, 1946, 63 Stat. 31. The Lower Basin states are entitled to apportioned shares in accordance with the Boulder Canyon Project Act, 43 U.S.C. § 617. *See Arizona* v. *California,* 373 U.S. 546 (1963).

These apportioned waters are property of the seven states who thus are responsible for allocating shares to various users within their respective jurisdictions. Among those users to whom water is allocated is the state itself for use in state-run recreation areas, fisheries and other concerns. As water users themselves, these states—all of which apply the doctrine of prior appropriation—compete with other users. It was in part to protect this proprietary interest from possible infringement that the various basin states sought, and were granted, intervention.

In addition to their proprietary interests, each state through which the Colorado River runs possesses a sovereign interest in those waters. These states have adopted various water quality standards embodied in water pollution control statutes and regulations. They have also adopted implementation plans for salinity

control. These plans and standards are the subject in controversy in this action and were promulgated by the states for the protection of their citizens. The states' interest in defending their plans and standards from direct attack by the plaintiff was another factor in their obtaining leave to intervene.

Furthermore, these states also have substantial economic interests in the development of the Colorado River. These states have pursued a course of development consistent with the water quality standards currently in force. They have begun beneficial projects in reliance on the current standards. These projects are of immense economic value to the states, and therefore the states' desire to protect them and assure the orderly growth and development of the areas served by the Colorado River presented a final ground for intervention.

On April 20, 1978, the district court denied the timely motions for leave to intervene as party defendants of several non-state parties, including Utah Power & Light Company.[1] Utah Power is the principal electric public utility in Utah, providing power throughout 79,000 square miles of Utah, Idaho and Wyoming. The company serves more than 400,000 residential, commercial, industrial and municipal consumers.

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[1] The other parties seeking intervention consisted of a group of seven public entities from the state of Colorado (viz., the Colorado River Water Conservation District; the Southwestern Water Conservation District; the Northern Colorado Water Conservancy District; the City of Colorado Springs, Colorado; City of Aurora, Colorado, Board of Water Works of the City of Pueblo, Colorado, and the City and County of Denver), the Metropolitan Water District of Southern California, and finally, a group of four diverse entities from several Basin states (the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress and the Yuma Auxiliary Project).

Water from the Colorado River basin is and will continue to be absolutely essential to the present and future operation of Utah Power's steam-electric generating units in the states of Wyoming and Utah. At the present time, the company has the right to withdraw 81,895 acre feet of water per year from the Colorado River drainage for use in Wyoming, and approximately 50,000 acre feet for use at three of its Utah plants. In addition, the company has applications pending for the withdrawal of an additional 1,895,440 acre feet per year, and it has also petitioned the Central Utah Water Conservancy District for an allocation of 40,000 acre feet of water representing a portion of the water needed for a proposed 3,000 megawatt power plant. Further, the company has applied for an additional 55,000 acre feet per year for potential nuclear plant usage. Finally, the company has certificated water storage rights of 87,895 acre feet, and has applied for an additional 330,000 acre feet annually for storage.

Utah Power's dependence upon the Colorado River and its tributaries is not limited to its need to withdraw water for the operation of its electric power plants. The company must also discharge materials from certain of its plants in Wyoming and Utah into receiving waters which are tributary to the Colorado River. At the present time the company is the holder of two permits from the United States Environmental Protection Agency authorizing the discharge of water in accordance with specific effluent limitations.

These water withdrawal rights and discharge permits are cornerstones of Utah Power's economic survival. Some of these rights and permits, however, are subject to modification and could be altered if the new

"conditions" sought by the plaintiff are ordered by the district court.

The district court recognized that Utah Power had a distinct concern over the remedies sought by the plaintiff by expressly finding that the company satisfied two of three requirements for intervention as of right.[2] The court first found that:

> [I]t is undisputed that all of the proposed intervenors in this case have at least a minimal interest in the regulations governing the salinity levels in the Colorado River since they all depend on the River, to one extent or another, for water or economic use.

Appendix A, p. 3a. Later, the court described the various water use and discharge permits and water storage licenses which Utah Power owns, concluding that "U.P.&L. has an interest in this matter." Appendix A, p. 11a.

With respect to the impairment requirement, the district court again held that Utah Power satisfied the statutory requirements. "[I]t appears that, in a general sense, denial of this motion [to intervene] may impair U.P.&L.'s ability to protect that interest." Appendix A, p. 11a. Additionally, the court noted that:

> [I]t seems sufficient, as far as the impairment of interest requirement, that there is a possibility that if this court invalidates these regulations the

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[2] Rule 24(a) of the Federal Rules of Civil Procedure provide that intervention as of right is allowed when, (1) the applicant claims an interest relating to the property or transaction which is the subject of the action and, (2) he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, (3) unless the applicant's interest is adequately represented by existing parties.

> ensuing rulemaking may result in a curtailment of U.P.&L.'s water use and storage rights.

Appendix A, p. 12a.

However, finding that Utah Power's interest in this litigation was adequately represented by Utah and Wyoming, Appendix A, p. 12a, and completely ignoring a memorandum from the state of Wyoming, Appendix C, which represented that that state could not adequately represent Utah Power's interest, the court denied Utah Power's motion for leave to intervene.

Utah Power, the Metropolitan Water District of Southern California, and the group of Colorado state and public entities all appealed the decision and moved for summary reversal of the order. The federal defendants and the plaintiffs moved for summary affirmance. On July 31, 1978, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court.

A two judge panel, consisting of Chief Judge Wright and Circuit Judge McGowan, issued a per curiam memorandum relying solely on this Court's decision in *New Jersey* v. *New York,* 345 U.S. 369 (1953), as the basis for its decision. The court did not disturb the district court's findings of Utah Power's interest in this litigation or the possible impairment of that interest. Rather, the court held that the doctrine of *parens patriae,* as explained by this Court in *New Jersey* v. *New York,* precluded Utah Power's intervention since all of the Colorado River Basin states had been allowed to intervene in the case. The court further held that:

> [w]hen the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

Appendix B, p. 21a.

The case in the district court is still in its pretrial stages. The district court has denied motions by the defendants for a change of venue and for judgment on the pleadings. Discovery is still being undertaken by the plaintiff and various intervenor defendants. A status call is scheduled for December 8, 1978, by which time discovery is scheduled to have been completed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals based its holding exclusively on this Court's decision in *New Jersey* v. *New York,* 345 U.S. 369 (1953). Completely discounting the original jurisdiction context of that case, Appendix B, p. 21a, n. 2, the court held that:

> [U]nder the *parens patriae* principle set forth in that case, intervention as of right *must be denied.*

Appendix B, p. 20a-21a (footnote omitted) (emphasis supplied). It was the court's misunderstanding and misapplication of *New Jersey* v. *New York* which led it to summarily affirm the district court's denial of intervention to Utah Power and which requires review by this Court.

I.

New Jersey v. *New York* was a case involving the original jurisdiction of this Court. In that action, this

Court denied the city of Philadelphia leave to intervene in an original suit by the state of New Jersey against the state of New York and New York City for injunctive relief against diversion of waters of the Delaware River. Since the state of Pennsylvania had been allowed to intervene and strongly opposed Philadelphia's intervention request, 345 U.S. at 372,[3] this Court required Philadelphia to satisfy a more stringent standard than is normally required for determining a prospective intervenor's adequacy of representation by existing parties in cases in the district court. 345 U.S. at 373.

The opinion in *New Jersey* unambiguously indicates that the original jurisdiction setting was the determinative factor in imposing the stricter standard.[4] What the Court of Appeals quotes as the "doctrine" of *New Jersey* is a doctrine of original jurisdiction, as this Court's opinion made clear:

> *Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.* An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

345 U.S. at 373 (emphasis supplied).

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[3] The state of Wyoming strongly supported Utah Power's intervention motion, *see* Appendix C, and none of the other states opposed that motion.

[4] Every case which this Court cited in *New Jersey* v. *New York* was a case involving this Court's original jurisdiction. Subsequently, every opinion of this Court citing *New Jersey* has been in a case involving original jurisdiction.

This Court has consistently stated that its procedure in original jurisdiction actions is different from the procedure of the district courts. *Ohio* v. *Kentucky,* 410 U.S. 641 (1973); *Rhode Island* v. *Massachusetts,* 14 Pet. 210 (1840). Because of this Court's desire to have its original jurisdiction invoked sparingly, it has frequently departed from the federal rules in original actions to limit its jurisdiction. *See e.g., Ohio* v. *Kentucky,* 410 U.S. 641 (1973); *Utah* v. *United States,* 394 U.S. 89 (1969).

Intervention necessarily expands the dimensions of an action, and thus it is especially appropriate for this Court to disregard the federal intervention rules when exercising its original jurisdiction. The Court in *New Jersey* expressly characterized its denial of intervention as an attempt to limit the dimensions of the original action before it. 345 U.S. at 373. This Court has recently confirmed that the *New Jersey* limitation on intervention applies *only* to original actions:

> We need not employ our original jurisdiction to settle competing claims to water within a single State. This is particularly the case where the individual users of water in the Newlands Project, *who ordinarily would have no right to intervene in an original action in this Court, New Jersey* v. *New York,* 345 U.S. 369, 373-375, 73 S.Ct. 689, 97 L.Ed. 1081 (1953), *would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court.*

United States v. *Nevada and California,* 412 U.S. 534, 538 (1973) (memorandum decision) (emphasis supplied). *Cf. Illinois* v. *City of Milwaukee, Wisconsin,* 406 U.S. 91 (1972).

This Court could not have made the scope of the *New Jersey* v. *New York* rule clearer. Only in original actions in this Court is the stricter standard of *New Jersey* to be employed.[5] In all district court cases, the Federal Rules of Civil Procedure, as interpreted by this Court, are to govern. This confirmation of the limited applicability of the *New Jersey* v. *New York* doctrine demonstrates the extent of the Court of Appeals' misunderstanding and misapplication of that doctrine. To assure proper interpretation of the *New Jersey* v. *New York* rule, this Court should review the Court of Appeals' decision.

The Court of Appeals' use of the *parens patriae* doctrine, even apart from its formulation in *New Jersey* v. *New York,* as a limitation on intervention is also a departure from precedents of this Court. In *Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251 (1972), this Court traced the development of that doctrine in federal litigation, demonstrating that it is a mechanism which allows a state to sue on behalf of its citizens "to prevent or repair harm to its 'quasi-sovereign' interests." 405 U.S. at 258. The Court also noted that *parens patriae* actions which this Court has considered "deal primarily with original suits brought directly in this Court." *Id.* The *parens patriae* principle is thus not a device for excluding private parties from litigation, as the Court of Appeals held, but rather one which allows a state to become a party to a litigation.

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[5] *See Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 137 (1967) where this Court ordered that both the state of California and Southern California Edison, a public utility within the state, be allowed to intervene in an antitrust suit in the district court pursuant to the predecessor of Rule 24. The Court did not mention *New Jersey* v. *New York.*

In *United States* v. *Nevada and California,* 412 U.S. 534 (1973), this Court again discussed the affirmative application of the *parens patriae* principle in an original jurisdiction context. The Court stated, in dicta, that in disputes between states over the allocation of water from an interstate stream, a state would have the "right, *parens patriae,* to represent all the nonfederal users in its own state insofar as the share allocated to the other state is concerned." 412 U.S. at 539.[6] *Parens patriae* was used again simply as a device to enable a state to participate where it might not otherwise be able to do so. The Court of Appeals' unprecedented expansion of this doctrine to prevent private parties from defending their own interests in suits brought in federal district courts merits review by the Court.

II.

By incorporating the "compelling interest" standard of original jurisdiction cases into intervention determinations in the district court, the Court of Appeals has distorted Rule 24(a) of the Federal Rules of Civil Procedure. Under that court's unprecedented interpretation of that Rule, a citizen seeking to intervene in a lawsuit in which his state is also a participant can satisfy the "compelling interest" standard only by demonstrating that during the course of the deliberation on the merits, the court will be required to reject

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[6] The Court did not address the issue of whether the state would have a similar right where there was no dispute between states but there was an attack on state-promulgated regulations in defense of which the states are jointly united. Neither did the Court address the question of whether the state's participation in the suit, *parens patriae,* barred citizens of that state from also participating. However, both issues are raised in the instant case.

an argument or claim advanced by the state because it was a claim or argument personal to the absentee intervenor. Appendix B, p. 22a n.3. This Court should review the Court of Appeals' decision in order to rectify this perversion of Rule 24(a).

The practical effect of the lower court's holding is the formulation of a *per se* rule of exclusion in which the state's participation in a lawsuit precludes any citizen of that state from intervening therein.[7] It does not matter that the interests of the state and prospective intervenor are distinct and potentially conflicting.

> When the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

Appendix B, p. 21a.

According to the lower court, a state's claim that it may not be able to adequately represent the citizen's interests is equally irrelevant.

> The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions' and citizens' views on water plans and rights as they relate to this case once they have intervened to represent those subdivisions and citizens.

Id.

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[7] One wonders if a prospective intervenor can *ever* demonstrate that a district court will have to *reject* a claim submitted by the state because it was personal to the absentee party.

The impropriety and harsh consequences of this rule are highlighted by the facts of this case. The state of Wyoming expressly declared that it could not adequately represent Utah Power's interest in this litigation, Appendix C. Wyoming also admitted that it had interests that could conflict with those of Utah Power, *Id.* Utah, the other state charged by the lower courts with representing Utah Power's interests, is participating in this lawsuit to protect three distinct interests, none of which is completely shared by Utah Power. According to the Court of Appeals, Utah Power must seek a "political" solution to protect its property interests.[8] It cannot seek judicial protection of its property in this case—a result which is constitutionally suspect.

The Court of Appeals' decision is contrary to the provisions of Rule 24(a) of the Federal Rules of Civil Procedure. This rule provides that one who meets the other requirements "shall be permitted to intervene . . . unless the applicant's interest is adequately represented by existing parties."[9] An applicant's interests can never be "adequately represented" by a party that has interests adverse to those of the applicant. *See e.g., Stadin* v. *Union Elec. Co.,* 309 F.2d 912 (8th Cir. 1962), *cert. denied,* 373 U.S. 915 (1963); *see also New Mexico* v. *Aamodt,* 537 F.2d 1102 (10th Cir. 1976), *cert. den.,* 429 U.S. 1121 (1977); *Johnson* v. *San Francisco Unified School Dist.,* 500 F.2d 349 (9th Cir. 1974).

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[8] The court below gave no hint as to the nature of the "political" remedies available to a party who has been denied intervention.

[9] The district court found that Utah Power met the other requirements of Rule 24(a) and the Court of Appeals did not disturb this finding. *See* p. 8 *supra.*

The various states who are allegedly representing Utah Power in this litigation possess interests adverse to those of the company and thus cannot represent its interests. The states are regulators; Utah Power is a regulated user. *See New York P.I.R.G.* v. *Regents of the University of the State of New York,* 516 F.2d 350 (2d Cir. 1975). The states and Utah Power are competing users of water. *See New Mexico* v. *Aamodt,* 537 F.2d 1102 (10th Cir. 1976) *cert. den.* 429 U.S. 1121 (1977). The states have the power to allocate water to other municipal and private users to the exclusion of Utah Power. Utah Code Ann. §§ 73-1-1, 73-3-1. The manner in which the states protect their interests as users, regulators and allocators will thus not always be to Utah Power's benefit, and quite possibly could impair its interests.

The Court of Appeals' newly formulated standard for Rule 24(a) intervention conflicts with this Court's decision in *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972). There, this Court ruled that Rule 24(a) requires only that the applicant show that representation of his interest *may be* inadequate, and that the burden of making this showing should be treated as minimal. This Court ordered that the applicant be allowed to intervene because there was "sufficient doubt about the adequacy of representation to warrant intervention." *Id.* at 538.

In this action, there is more than "sufficient doubt" about the states' ability to represent Utah Power. Wyoming has conceded that it cannot represent Utah Power's interest, Appendix C. Moreover, the states intervened to protect their regulations from plaintiff's challenge. Thus, the states' primary interest in this action is that of a *regulator.* Utah Power's interest,

however, is that of a *regulated user* of water. The interests of the regulator and the regulated user are different and potentially conflicting. *See New York P.I.R.G.* v. *Regents of the University of State of New York,* 516 F.2d 350 (2nd Cir. 1975). The state is the owner of all of the Colorado River water within its boundaries. Utah Code Ann. § 73-1-1. It also has the power to allocate that water to various users, including Utah Power, but even more importantly, to itself. The interests of competing users of this water are conflicting. Thus, *Trbovich* requires that intervention be permitted.

In *Trbovich,* this Court, reversing the District of Columbia Circuit, ruled that although the Secretary of Labor was charged by statute with representing the interests of the applicant, intervention was still warranted because the Secretary also had a duty to serve another distinct interest, the public interest. The Court recognized that "[b]oth functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation." *Id.* at 539.

The states in this action, like the Secretary in *Trbovich,* have a duty as regulators of the states' water resources to protect sovereign interests which are distinct from the purely proprietary interests of Utah Power. Furthermore, the states have their own proprietary interests in this litigation which, in fact, are in conflict with those of Utah Power. Should the state decide in the course of this litigation that its sovereign, economic, or indeed its own proprietary interests are more important than Utah Power's proprietary interest, then Utah Power's views will not be represented in the litigation. *See New Mexico* v. *Aamodt,* 537 F.2d 1102 (10th Cir. 1976) *cert. den.* 429 U.S. 1121 (1977).

The Court of Appeals would have these differences resolved through the "political processes." Rule 24(a) and *Trbovich* are clear and to the contrary; the applicant must be permitted to intervene and speak for itself.

The Court of Appeals for the District of Columbia Circuit has adopted the *Trbovich* standard. *See Hodgson* v. *United Mine Workers,* 473 F.2d 118 (D.C. Cir. 1972); *Natural Resources Defense Council* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977). It has also recognized that cases arising before the 1966 amendments to Rule 24 concerning the adequacy of representation standard are of little value in construing the amended Rule. *Nuesse* v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967). Yet, the court felt so constrained by this Court's pre-amendment *New Jersey* v. *New York* decision that it ignored both its own admonition in *Nuesse* v. *Camp* that such cases were of "little guidance," and its post-amendment adoption of *Trbovich*. This Court should review the Court of Appeals' decision in order to assure consistent application of Supreme Court precedent in the District of Columbia Circuit.

The precedential impact of this decision undermines both Rule 24(a) and this Court's decision in *Trbovich*. It will operate to preclude intervention by private parties in actions concerning dual regulation by the states and federal government. Under the rule established by the Court of Appeals, the necessary participation by the states would prevent participation by other parties. Under this rule, the courts will determine important issues concerning the validity of federal and state regulations without the views of those persons who are directly affected—the regulated

CONCLUSION

The Court of Appeals has established unprecedented standards for determining a prospective intervenor's adequacy of representation when a state has intervened in federal district court litigation. It has engrafted this Court's intervention standards in original jurisdiction cases onto the routine intervention determinations in district court cases. It has misapplied this Court's *New Jersey* v. *New York* rule and its formulation of the doctrine of *parens patriae*. It has both amended Rule 24(a) of the Federal Rules of Civil Procedure and ignored this Court's decision in *Trbovich* v. *United Mine Workers*. In order to reestablish the limitations of *New Jersey,* to conclusively reaffirm the principles of *Trbovich* and *parens patriae,* and to authoritatively interpret Rule 24(a), this Court should issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND, INC., *Plaintiff*,

v.

DOUGLAS M. COSTLE, ET AL., *Defendants*.

Civil Action No. 77-1436

Filed April 20, 1978

MEMORANDUM OPINION AND ORDER

This matter comes before the court on motions to intervene filed by a variety of private and public entities. The case in chief involves a dispute regarding the salinity level in the waters of the Colorado River. Pursuant to 33 U.S.C. §§ 1311-1313, the seven states of the Colorado River Basin, after several years of interstate negotiations, adopted salinity control standards for the River. In 1976, the Environmental Protection Agent (EPA) approved the salinity standards agreed to by the states. As yet, no general water quality standards have been devised by the states. Plaintiff Environmental Defense Fund (EDF) has filed a complaint containing six claims regarding this situation. First EDF contends that the salinity standards promulgated by the states and adopted by EPA fail to meet the requirements of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, and that the Director of EPA acted contrary to his mandatory duties in approving the plan. Second, EDF asks that the federal defendants be compelled to promulgate acceptable salinity standards. Third, EDF asks that EPA take over the states' task of identifying point sources where salinity standards are not being met and to

establish daily maximum load levels. Fourth, EDF asks that the planning process assigned to the states under section 1313 be closely monitored by EPA. Fifth EDF seeks to compel the Department of the Interior to implement the water quality policies promulgated by the Basin states in their 1972 Conference and adopted by the Colorado River Salinity Control Act of 1974, 88 Stat. 270. Sixth, EDF seeks to compel the federal defendants to seek alternate ways in which to deal with the salinity problem. In light of the broad nature of the participation of the Colorado River Basin states in the promulgation of the regulations at issue in this case, this court allowed the seven Basin states to intervene as defendants in this matter on January 19, 1978.

It is against this background that the present motions to intervene must be judged. Four motions to intervene are currently pending before this court. The first motion was filed by a group of state and municipal public entities from the state of Colorado. For the purposes of convenience, these entities shall be referred to as Intervention Group I. The second motion was filed by the Metropolitan Water District of Southern California. The third motion was filed by the Utah Power and Light Co., a utilities company. The fourth motion was filed by a group of organizations representing a variety of interests in the Basin area, and shall be referred to as Intervention Group II. Although there is some overlapping of the issues presented by each of these motions, each motion shall be analyzed separately so that any distinct interests represented by the intervenors will be accorded full consideration.

Each of these entities seeks intervention as of right, or in the alternative permissive intervention. The request for intervention as of right shall be discussed first.

I. Intervention as of Right.

Intervention as of right is governed by Federal Rule of Civil Procedure 24(a), and particularly in this case by subdivision (a)(2), which states:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is undisputed that all of the proposed intervenors in this case have at least a minimal interest in the regulations governing the salinity levels in the Colorado River since they all depend on the River, to one extent or another, for water or economic use. Therefore, the issues before the court are whether the proposed intervenors' interests will be practically impaired by the disposition of this case, and whether the present parties adequately represent the proposed intervenors' interests.

A. *Intervention Group I.*

As indicated earlier, the seven entities in this group are all state or municipal public entities from the state of Colorado. The Colorado River Water Conservation District is an agency of the state of Colorado charged with preserving the waters allocated to Colorado pursuant to the interstate Colorado River Compact. It is the principle water policy agent of the state regarding the headwaters of the Colorado River. The second member of this group is the Southwestern Water Conservation District, which is another state agency which is charged with oversight of the tributaries of the Colorado River in the southern part of the state. The third member is the Northern Colorado Water Conservancy District, a state agency which contracts with the U.S. Bureau of Reclamation for the repayment of facilities constructed by the U.S. in the Colorado-Big Thompson Federal Reclamation Project. The fourth member is the city of Colorado Springs, Colorado. The fifth member is the city of

Aurora, Colorado. The sixth member is the Board of Water Works of the City of Pueblo, Colorado. The seventh member is the city and county of Denver, which appears through its Water Commission. The first three members are all state agencies which deal with water supply in one form or another. The last four are municipal corporations or the agencies thereof which seek to secure the water supplies for their populations.

1. *Practical Impairment of Interest.* The entities in Group I indicate that they feel that in light of their dependence on the Colorado River as a source of water and of income, denial of their motion to intervene in this suit will practically impair or impede their efforts to protect their rights to use of the River. The plaintiff and the Federal defendants dispute their contentions. They point out that if this court were to invalidate these regulations, then EPA would have to engage in rulemaking, during which the proposed intervenors could once again act to protect their positions. Further, the plaintiff and the federal defendants state that this case will have no stare decisis effect on the proposed intervenors in the context of this dispute. The plaintiff and the federal defendants view this case as only a possible first step in a process. If the regulations are upheld, the proposed intervenors retain their present water rights. If the regulations are overturned, the proposed intervenors suffer no immediate deprivation since the entire rulemaking process must begin over again.

Despite the apparent logic in the position advanced by the plaintiff and the federal defendants in regard to this requirement for intervention as of right, their position does not appear to comport with the law. In *Natural Resources Defense Council v. Costle,* 561 F.2d 904 (D.C. Cir. 1977), the court stated that, "[I]t is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." Id. at 910. The *N.R.D.C.* case involved a situation in which

this district court was closely involved in monitoring the implementation of a settlement agreement. The court's role in the present case is much more limited, and to that extent the *N.R.D.C.* suit is distinguishable. However, the circuit court indicated that factors of convenience are especially relevant in cases of administrative review. *Id.* Since this case would seem to fall into that mold and assuming *arguendo* that the proposed intervenors have an interest distinct from those already represented in this case, intervention should not be denied solely on the grounds that those interests would not be impaired by an adverse disposition of this suit.

2. *Adequacy of Representation.* The more crucial question in this context therefore becomes whether the entities already in this suit will adequately represent the interests advanced by the proposed intervenors. The determination of this issue is complicated in this case by the presence of the seven Basin states as intervenor/defendants. As such, this court must determine whether the EDF, the federal defendants and, in this case, the state of Colorado adequately represent the interests advanced by the entities in Group I.

In order to shoulder the burden of proving inadequacy of representation under Rule 24(a)(2), the proposed intervenors need only show that the representation of their interests by the other parties may be inadequate and this burden is a minimal one. *Tbrovich v. United Mine Workers of America,* 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n.10 (1972). The proposed intervenors contend that their interests, although not necessarily antagonistic to those of the state of Colorado, are sufficiently different and particularized to warrant a finding of inadequacy of representation. The plaintiff and the federal defendants argue that since the proposed intervenors in Group I are all state or municipal subdivisions of the state of Colorado, then the presence of the state in this case indicates that the interests of the proposed intervenors are adequately represented.

In asserting their case in support of intervention, the proposed intervenors place primary reliance on three cases: *N.R.D.C. v. Costle, supra; United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972); and *New York P.I.R.G., Inc. v. Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975) [hereinafter cited as *P.I.R.G. v. Regents*]. However, all three of these cases are fundamentally inapplicable to the case at hand.

In *N.R.D.C. v. Costle, supra*, the government and several industrial groups had entered a settlement agreement whereby the EPA would promulgate certain sets of regulations pursuant to the Federal Water Pollution Control Act, *supra*. Only the participants in the settlement agreement would have input into the rulemaking proceedings and in the implementation and oversight proceedings in the district court. This court denied intervention to several other industrial groups on the theory that the EPA would adequately represent the interest that all regulations should be lawful, and the other industrial participants would assure that industries' point of view was presented. The circuit court reversed, stating that the additional industrial group had an interest in the actual content of the regulations, not just in their legality. Furthermore, the circuit court indicated that since a variety of effluents were to be regulated, the various producers of these effluents should be heard. 561 F.2d at 912. In the present case, the court is not so intimately involved. This court's task is simply to rule on the validity of regulations already promulgated. If those regulations are found wanting, the statute provides that EPA, not this court, shall engage in *de novo* rulemaking. Furthermore, no action by this court in this case will limit the access of any of these proposed intervenors to any further rulemaking.

Whereas a settlement agreement expanded the court's function in the *N.R.D.C.* case, the court in *United States v. Reserve Mining Co.*, found its role expanded by statute.

Because the suit in that case was an abatement action brought by the United States to end the depositing of taconite into Lake Superior, the court determined that the Federal Water Pollution Control Act, 33 U.S.C. § 1160 (c)(5), required it to weigh a variety of interests in determining whether the regulation had been violated and if compliance was feasible. 56 F.R.D. at 413. The court indicated that:

> The role of a court in such a situation, because of the nature of the proceedings and considerations which must be reviewed and undertaken pursuant to the statute, transcends ordinary civil litigation and makes a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case.

Id. The court noted that in such an atypical civil litigation, the interest requirement in an environmental matter should be inclusive, not exclusive. *Id.* In view of this expanded role, the court in *Reserve Mining* allowed wide intervention. Specifically important is the view of the proposed intervenors in this case is the fact that the court allowed several towns, villages and counties of the state of Minnesota to intervene. The court noted explicitly that the state of Minnesota itself was not a party to this proceeding, although it was Minnesota's regulation that was at issue. The court further noted that if Minnesota had intervened, allowing the local entities to intervene in this matter would create the conceptual problem of allowing the local entities to oppose state environmental policy which they would normally be without power to contravene. *Id.* at 415-16. However, the court noted that under the circumstances it would treat the local entities as the court's advisors regarding the economic impact of any proposed regulation. *Id.* at 416. It is clear that the present case is much more in the nature of ordinary civil litigation. This is not an abatement action, and the court may not engage in any weighing of interests. This court is interested in the contents of the regulations at issue in

this case only insofar as they indicate whether the Secretary has met his statutory duty in approving their adoption. The court in *Reserve Mining* took great pains to indicate the exceptional nature of the case before it as a means of justifying its wide-ranging grant of intervention. Absent such extreme circumstances, this court must be more circumspect in allowing intervention.

The final case upon which the proposed intervenors in Group I principally rely is *P.I.R.G. v. Regents, supra.* In that case, a public interest group attacked a New York State regulation governing pricing policies in pharmacies. An association of pharmacists sought to intervene so as to represent their economic interests in the matter. The court held that while the question of adequacy of representation was a close one, there was a substantial likelihood that the pharmacists would represent their own economic interests more vigorously than would the state, especially in light of the state's admission that its interests might be adverse to those of the pharmacists. 516 F.2d at 352. It should be noted that the entities in Group I are not private groups seeking to maximize profits, but they are all public entities which, in one way or another, are bound closely by state regulation. It is this nature of the governmental relationship between the state of Colorado and the proposed intervenors in Group I which forms the crux of the argument advanced by the parties opposing the intervention motion.

In opposing the motion of Group I for intervention, the plaintiff and the federal defendants urge this court to accept the doctrine of *parens patriae* as presented by the Supreme Court in *State of New Jersey v. State of New York,* 345 U.S. 369, 73 S.Ct. 689 (1953). In that case, the state of New York, upon petition of New York City, planned to divert the waters of the Delaware River for drinking water purposes. The state of New Jersey brought an original action in the Supreme Court to enjoin the diversion, and forcibly joined New York City as an indispensible party

defendant. The state of Pennsylvania was also allowed to intervene as a user of the Delaware River waters, and the case proceeded to judgment before a special master who devised a plan for the use of the waters. Some years later, the city of New York petitioned to reopen the case so as to modify the plan and increase its share of the water supply. Upon reopening, the City of Philadelphia petitioned to intervene on the grounds that it too relied on the river for water. In rejecting the petition to intervene, the Supreme Court relied on the doctrine of *parens patriae:*

> The "parens patriae" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." Com. of Kentucky v. State of Indiana, 1930, 281 U.S. 163, 173-174, 50 S.Ct. 274, 277, 74 L. Ed. 784. The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Id. at 372-373, 73 S.Ct. at 691. After cataloging the problems which would ensue if the Court became involved in "an intramural dispute over the distribution of water within the Commonwealth," *id.* at 373, 73 S.Ct. at 691, the Court stated:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

Id.

Although the Supreme Court made this analysis of the *parens patriae* doctrine within the context of its original jurisdiction, the doctrine is not limited to that situation. The Third Circuit advanced a similar analysis in *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501 (3d Cir. 1976), and stated:

> [A] presumption of adequate representation generally arises when the representative [of a proposed intervenor's interest] is a governmental body or officer charged by law with representing the interests of the absentee. . . . Where official policies or practices are challenged, it seems unlikely that anyone could be better situated to defend than the governmental department involved and its officers.

Id. at 505. All of the entities in Group I are state agencies or offices, or municipalities within the state of Colorado. None have offered any compelling reason or circumstance in which they validly differ with the position taken by the state of Colorado. The formulation of these salinity control standards were expressly left to the states of the Colorado River Basin. The various public subdivisions which here seek to intervene do not allege that the states or the federal government acted illegally in promulgating these regulations. The issues of the allocation of the water levels approved, or the implementation of these regulations are not before this court. As such, the interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states. Since the states adequately represent the interests of these entities, intervention as of right is denied.

B. *Metropolitan Water District of Southern California*

The second motion to intervene was filed by the Metropolitan Water District of Southern California. By its own admission, this proposed intervenor is a public corporation

created by the Metropolitan Water District Act of California, with its primary functions being to develop, store and deliver water to approximately 27 other public agencies, which in turn distribute the water to approximately half of the population of the state. The reasons in support of this motion are similar to those advanced by the entities in Group I, *supra*. Since the Metropolitan Water District is a creature of the state of California, and since the state of California has already intervened in this action, the Metropolitan Water District's motion to intervene as of right is denied for the same reasons as were advanced regarding Group I, *supra*.

C. *Utah Power and Light Co.*

Utah Power and Light Co. (hereinafter U.P.&L.), a utility company which supplies a large portion of the total electricity used in the states of Utah and Wyoming, filed the third motion to intervene. U.P.&L. holds several water use permits and water storage licenses in connection with its hydroelectric generating plant on the Colorado River. U.P.&L. indicates that if it is not permitted to intervene, it will be unable to protect its interests in these permits and licenses.

Granting that U.P.&L. has an interest in this matter, it appears that, in a general sense, denial of this motion may impair U.P.&L.'s ability to protect that interest. This suit is not simply seeking a review of administrative action. It is a citizen's suit brought pursuant to 33 U.S.C. § 1365(a) to compel the Administrator to do some nondiscretionary act. Such a suit may be brought by "any citizen", and section 1365(g) defines the term "citizen" as "a person or persons having an interest which is or may be adversely affected." Although the right to intervene in an enforcement action has been limited, 33 U.S.C. § 1365(b), *see Stream Pollution Control Bd. of Indiana v. U.S. Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir. 1975), no limitation has been

created for citizen suits. Therefore, it seems sufficient, as far as the impairment of interest requirement, that there is a possibility that if this court invalidates these regulations, the ensuing rulemaking may result in a curtailment of U.P.&L.'s water use and storage rights.

The court must, therefore, determine once again whether the parties already present in this suit adequately represent the interests of the moving entity. The states of Utah and Wyoming represented to the court in their motions to intervene that they could protect the interests shared by their citizenries in water quality control, water resource planning and allocation, and the various forms of economic development dependent on the river. U.P.&L. admits that it does not disagree with the positions taken by any of the other defendants in this matter, but rather states that inadequacy of representation results since its interest is more specific than those represented by the states and federal defendants.

Although the standard for determining inadequacy of representation is lenient, the moving party still bears the burden of showing that representation may be inadequate. *Trbovich v. United Mine Workers, supra.* Also, though it is true that in some cases the existence in the moving party of a more narrow interest than those represented by the current parties may justify intervention, the cases so holding primarily involve situations in which the court must perform a quasi-administrative function, *N.R.D.C. v. Costle, supra; United States v. Reserve Mining Co., supra;* or where the interests of the governmental representative of individual claims is actually adverse to those claims. *State of New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976) (Navajo Indians permitted to intervene in water rights suit despite U.S. duty to represent them since U.S. interest in the suit was adverse to Indian water claims); or where the provision in question specifically deals with an area of economic regulation which the state admittedly could not adequately represent, *P.I.R.G. v. Regents, supra.* The present case involves none of these situations. This case deals only with the adequacy of the salinity standards promulgated by the states and whether the Administrator fulfilled his statutory duty in approving these plans. As such, the parties are limited to arguing for or against the validity of these regulations. Individual interests such as those U.P.&L. seeks to advance are largely irrelevant. U.P.&L.'s arguments directed at the subject matter of his case will be cumulative of the arguments advanced by the other defendants. Therefore, this court is of the opinion that U.P.&L. is adequately represented in this case, and the motion to intervene as of right is accordingly denied.

D. *Intervention Group II*

The final motion to intervene was filed by a group of four diverse entities from a variety of the Basin states. The Mountain States Legal Foundation is a non-profit public interest law center which states that it seeks to intervene on behalf of its directors, officers, supporters and other individuals who rely on the water of the Colorado River for consumptive uses. The National Water Resources Association represents the water users of 18 Western States. Some of its members rely on the Colorado River for irrigation and municipal water supplies. The Colorado Water Congress represents 1,800 individual water users within the state of Colorado, most of whom are either municipalities or industries. Finally, the Yuma Auxillary Project is an irrigation district in southern Arizona which contracts with the United States for the use of the Colorado River waters for irrigation. These four groups seek jointly to protect their members' interests in maintaining their consumption rights to the Colorado River waters are presently allocated under the existing interstate water compacts among the Basin states.

Because of the flexible standards applied to the determination of whether a proposed intervenor has an interest in

a case at all, it would be difficult to say that these four intervenors do not possess such an interest since all of them represent people and corporations which use the Colorado River water in one way or another. Similarly, because the end product of this suit might be that new, more restrictive regulations may be made, it is difficult to say that the proposed intervenors will not be practically impeded in the defense of their interests if intervention is denied. However, the interests expressed by the intervenors in Group II are so general that it must, as a matter of law, be stated that the states adequately represent those interests. There is no evidence of any disagreement between the states and the intervenors in this group. The interests advanced are shared by all the citizens of the Basin states and therefore the representation of those general, non-adverse interests should be left to the states under the doctrine of *parens patriae* as outlined above. If such were not the case, there would be no limit to the intervention as of right which might occur. Therefore, because the entities in Group II represent general interests shared by the entire populations of the intervening states, intervention as of right should be denied. *See Stream Pollution Control Board of the State of Indiana v. U.S. Steel Corp.*, 61 F.R.D. 31, 35 (N.D. Ind. 1974), *aff'd* 512 F.2d 1036 (7th Cir. 1975) (individual intervention into suit to abate whether pollution denied where proposed intervenor's only interest in suit was same as that of the general public).

II. *Permissive Intervention.*

All of the entities moving for intervention as of right have also moved in the alternative for permissive intervention. Under Federal Rule of Civil Procedure 24(b), the court may permit intervention when the applicant's claim or defense has a common issue of law or fact with the main action, and where the court in the exercise of its sound discretion determines that the intervention will not unduly delay or prejudice the adjudication of the case of the original parties. A motion for permissive intervention is addressed to the court's discretion, and the court's action on such a motion will not be reversed unless the court abused its discretion. *Brewer v. Republic Corp.*, 513 F.2d 1222 (6th Cir. 1975); *Garrett v. United States*, 511 F.2d 1037 (9th Cir. 1975).

Regarding the entities in Intervention Group I, and the Metropolitan Water District of Southern California, the doctrine of *parens patriae* indicates that it may be prejudicial to the states which have already intervened in this suit to allow the various political subdivisions of the states the opportunity to question state policy which the entities might not otherwise have. Since as a matter of law these entities are represented by the states, any evidence they offer will be merely cumulative, and in that respect an unwarranted delay will occur. Therefore, this court will, in the exercise of its discretion, deny permissive intervention to the entities in Group I and to the Metropolitan Water District of Southern California.

The situation presented by Utah Power and Light is analogous. U.P.&L. has indicated no way in which it will supplement the position already taken by the other parties. The views of U.P.&L. has indicated that it will express are unlikely to be helpful to this court in the resolution of this matter. *Commonwealth Edison Co. v. Train*, 71 F.R.D. 391 (N.D. Ill. 1976). Therefore, this court should in the exercise of its discretion deny permissive intervention to Utah Power and Light.

The entities in Intervention Group II present a somewhat different situation. These entities have indicated that regardless of the type of intervention they receive, they seek intervention for the sole purpose of assuring that this court gives adequately consideration to the various interstate compacts regulating water use in the Colorado River Basin, and the extent to which Congress and the courts have adopted these compacts. Examination of the answers

submitted by the states indicates that only New Mexico and Wyoming advance any arguments based on these compacts. However, neither of these two states seem to intend to engage in the depth of analysis promised by the entities in Group II. These interstate conferences and compacts are crucial to an understanding of the problems faced by the Basin states and the Administrator in adopting salinity control plans. As such, the information offered by the entities in Group II would appear to be helpful to the court in the consideration of this matter. *Commonwealth Edison Co. v. Train, supra.* Therefore, the court will permit the entities in Group II to intervene for the limited purpose of briefing the court on the extent and effect of the various interstate water use compacts in the Colorado River Basin.

An appropriate Order accompanies this Memorandum Opinion.

THOMAS A. FLANERY
UNITED STATES DISTRICT JUDGE

DATED: April 20, 1978

[Caption Deleted in Printing]

ORDER

This matter comes before the court on four motions to intervene. Upon consideration of the motions, the memoranda submitted in support thereof and in opposition thereto, and the entire record now before the court, and for the reasons stated in the memorandum filed in this case this same day, it is, by this court, this 20th day of April, 1978,

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Colorado River Water Conservation District; the Southwestern Water Conservation District; the Northern Colorado Water Conservancy District; the city of Colorado Springs, Colorado; the city of Aurora, Colorado; the Board of Water Works of the City of Pueblo, Colorado; and the city and county of Denver, Colorado be, and the same hereby is, denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Metropolitan Water District of Southern California be, and the same hereby is, denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Utah Power and Light Co. be, and the same hereby is denied; and it is further

ORDERED that the motion for intervention as of right, or alternatively for permissive intervention, submitted by the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress, and the Yuma Auxillary Project be, and the same hereby is, granted in part and denied in part; and it is further

ORDERED that the Mountain States Legal Foundation, the National Water Resources Association, the Colorado Water Congress, and the Yuma Auxillary Project be, and hereby

are, permitted to intervene as a group for the limited purpose of briefing this court on matters regarding the various interstate water use compacts in the Colorado River Basin.

/s/ THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil Action No. 77-1436

No. 78-1471

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UTAH POWER AND LIGHT COMPANY, *Appellant*

No. 78-1515

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, *Appellant*

No. 78-1566

Civil Action No. 77-1436

ENVIRONMENTAL DEFENSE FUND, INC.

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Appellant*

Filed July 31, 1978

BEFORE: WRIGHT, Chief Judge; MCGOWAN, Circuit Judge

ORDER

On consideration of appellants' motions for summary reversal, of appellees' motions for summary affirmance, of the motions by Environmental Defense Fund for oral argument and to strike affidavit in appellant Utah Power and Light Company's papers, of the responses filed with respect to the foregoing motions, and, for the reasons set forth in the attached memorandum, it is

ORDERED by the Court that the appellants' motions for summary reversal are denied, it is

FURTHER ORDERED that the motion to strike affidavit attached to appellant Utah Power and Light Company's papers is granted and, it is

FURTHER ORDERED by the Court that appellees' motions for summary affirmance are granted and the order of the District Court on appeal herein be, and the same hereby is, affirmed.

The Clerk is directed to transmit a certified copy of this order to the District Court.

Per Curiam

MEMORANDUM

We affirm the order of the District Court denying intervention to appellants. Since the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming have intervened, in our view the case is governed by *New Jersey v. New York*, 345 U.S. 369 (1953), and under the *parens patriae* principle set forth in that case, intervention

as of right must be denied.[1] That "principle is a *necessary recognition* of sovereign dignity, as well as a working rule for good judicial administration." *Id.* at 373 (emphasis supplied). When the views of appellants are identical to those of their states, there is no need for intervention; when the views of appellants differ from those of their states, those differences are to be resolved through the internal mechanisms, such as the political processes, of the sovereign states rather than by the federal courts.

We have considered appellants' efforts to distinguish *New Jersey v. New York*, and we do not find them persuasive.[2] Under the doctrine of that case, an "intervenor whose state is already a party should have the the burden of showing some *compelling interest in his own right*," *id.* at 373 (emphasis supplied). Appellant's stated justifications for intervention do not meet this strict test. Appellants urge that their states do not oppose intervention. Lack of state opposition, however, does not rise to the level of a compelling interest in separate representation. The states may not readily relinquish their sovereign function of resolving differences (if any) among their political subdivisions' and citizens' views on water plans and rights as they relate to this case once they have intervened to represent those subdivisions and citizens. Appellant Metropolitan Water District of Southern California (Southern California) urges that its interests created by federal statutes and water contracts cannot be adequately represented by the

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[1] We also do not find that the District Court abused its broad discretion to deny permissive intervention.

[2] The Supreme Court's opinion in that case places little emphasis on the fact that the case was within the Court's original jurisdiction, and does not even mention the wording of Fed. R. Civ. P. 24(a) of that time.

State of California. In the context of this case, we do not find that its interests require seperate representation.[3]

We emphasize that our decision imports no view whatsoever on the merits of the case, which were neither briefed for the Court not considered by it on these motions.

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[3] We are not surprised that the states welcome intervention on their side. The position of the states was a factor relevant to the District Court's decision on permissive intervention, but we do not find that it creates mandatory intervention rights.

Southern California has not made the showing of *concrete* adverse interests of state and locality in this context required to find that separate representation is necessary in this case. We assume that if the District Court found, in the course of deliberation on the merits, that some major argument or claim advanced by California had to be rejected solely on the grounds that it was personal to the absentee Southern California, *cf. New Mexico* v *Aamodt*, 537 F.2d 1102, 1107 (10th Cir. 1976), that the District Court would reconsider granting Southern California limited intervention.

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action File Number 77-1436

ENVIRONMENTAL DEFENSE FUND, INC., *Plaintiff*,

—VS—

DOUGLAS M. COSTLE, as Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Defendants*.

Received February 6, 1978

MEMORANDUM IN SUPPORT OF UTAH POWER AND LIGHT COMPANY'S MOTION TO INTERVENE AS A DEFENDANT

The State of Wyoming respectfully submits this Memorandum in support of the pending motion of Utah Power and Light Company to intervene as a party defendant. The State of Wyoming so submits this Memorandum in the belief that Utah Power has demonstrated its entitlement to intervention in accordance with the requirements of Rule 24 of the Federal Rules of Civil Procedure, as so thoughtfully and liberally interpreted in the decisions of the Court of Appeals for the District of Columbia Circuit.

In supporting her own motion to intervene in this action, the State of Wyoming pointed out that she was seeking to protect "the broad interests" that are at issue in this action, including "her sovereign interest in the protection of water quality standards and implementation plan for salinity, her proprietary interests in waters claimed by the State pursuant to the Colorado River Compact and the Upper Colorado River Basin Compact, and her concern for the protection of numerous and diverse economic interests which are accordingly endangered." (Wyoming Brief in Support of Motion to Intervene as a Defendant, page 6).

Utah Power is a significant supplier of electrical energy to consumers in the State of Wyoming. Utah Power has the right to withdraw 81,895 acre feet of water per year from the Colorado River drainage for its use in Wyoming, thus making it clear that water from the Colorado River drainage is "absolutely essential to the present and future operation of steam-electric generating units in the States of Wyoming and Utah." (Memorandum of Points and Authorities in Support of Utah Power and Light Company for Leave to Intervene, page 2). the plaintiff and federal defendants do not challenge Utah Power's interests in the subject matter of this action, but argue that those interests are adequately represented by the existing parties, particularly the states.

The State of Wyoming wishes to emphasize that while the State may share "general agreement" with Utah Power concerning the adequacy of existing regulations of Colorado River salinity, it would be erroneous to assume that the State is representing or can adequately represent the specific interests of Utah Power that are at issue in this proceeding. To the contrary, Wyoming's interests are not only far more diverse than those of Utah Power, but indeed may at times be in conflict with those of Utah Power. Therefore, the State cannot fairly be charged by this Court with protecting and representing the specific interests of Utah Power in this litigation.

The State of Wyoming must stress that she is not insensitive to this Court's expressed concern at the January 18, 1978, status call that this action not be overburdened by a multitude of intervening defendants. However, although this action has now been pending for five months, Utah Power is the only utility in the entire seven-state Colorado River Basin to seek intervention in order to protect its interests.

Moreover, this Court very amply demonstrated at the January 18, 1978, status call that it fully possesses the capacity, the will and the power to prevent any abuse of the Court's process by any of the parties to this litigation.

In order that Utah Power may be enabled to protect the specific interests which it asserts, and for all the reasons set forth above and in the memoranda of Utah Power and Light Company, the State of Wyoming respectfully requests that the Motion of Utah Power and Light Company for leave to intervene as a party defendant be granted.

Respectfully submitted,

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